82-1290

FILED
Jan. 21 1983
ALEXANDER L. STEVAS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

ROTH'S IGA FOODLINER, INC.,
Petitioner,
and
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ronald J. Williams
Dean T. Zografos
Wendy B. Comstock
Williams & Zografos, P.C.
110 Wallace Road N.W.
P.O. Box 5419
Salem, Oregon 97304
(503) 362-6910

Counsel for Petitioner

January 20, 1983

Questions Presented

1. Did the Ninth Circuit err in enforcing the National Labor Relations Board's bargaining order, contrary to four (4) other circuits and other Board decisions, when it held that a single store unit is appropriate when the evidence showed geographic proximity; integration of operation and supervision; substantial interchange of employees; identical conditions of employment and job classifications; and a history of bargaining consistent with an employer-wide unit?

2. Did the Ninth Circuit err in enforcing the Board's bargaining order providing for piecemeal unionization and thereby ignoring the Employer's interest in avoiding a patchwork of bargaining agents in a centralized operation?

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	14
1. THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS	16
2. PUBLIC POLICY REQUIRES A UNIFORMLY APPLIED TEST	17
3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS	20
Conclusion	21
Appendix	
Certificate of Service	

TABLE OF AUTHORITIES

Cases	Pages
Bowman Transportation, 230 NLRB 143, 195 LRRM 1423 (1977)	18
Building Construction Employer's Association, 147 NLRB No. 29, 56 LRRM 1210 (1964)	18
Consolidated Foods Corp., 213 NLRB No. 60, 87 LRRM 1170 (1974)	19
Excelsior Underwear, Inc., 165 NLRB 1236 (1966)	A19
Groendyke Transport, Inc., 171 NLRB No. 143, 68 LRRM 1227 (1968)	18
Haag Drug Co., Inc., 169 NLRB 877 (1968)	A13
ITT Continental Baking Co., 231 NLRB No. 61, 96 LRRM 1002 (1977)	20
Kendall Company, 184 NLRB 847(1970)	A13
Melbet Jewelry Co., Inc. & I.D.S.-Orchard Park, Inc., 180 NLRB 107 (1969)	A15
NLRB v. Chicago Health & Tennis Clubs, 567 F2d 331, 96 LRRM 3249 (Seventh Cir, 1977)	14,16
NLRB v. Lerner Stores Corp., 506 F2d 706,707-08 (9th Cir, 1978)	A3

NLRB v. Pinkertons, 428 F2d 479, 74 LRRM 2355 (1970) 16

NLRB v. Purity Food Stores, 376 F2d 497, 65 LRRM 2261 (1967) 15,16,17

NLRB v. Retail Clerks Local 588, 587 F2d 984 (9th Cir, 1978) A3

NLRB v. Wyman-Gordon Company, 394 US 759 (1969) A19

Pacific Southwest Airlines v. NLRB, 587 F2d 1032, 1037 (9th Cir, 1978) A2

TRT Telecommunications Corp., 230 NLRB 139 (1977) A14

Universal Security Instrument v. NLRB, 250 NLRB No. 92, 105 LRRM 1023 (1980); affirmed 649 F2d 247, 107 LRRM 2518 (1981) 15,16,18

Universal Camera Corp. v. NLRB, 340 US 474, 71 S.Ct. 456 (1951) A3

Warehouse Markets, Inc., 174 NLRB 401 (1969) A16

Wayne Oakland Bank v. NLRB, 462 F2d 666, 80 LRRM 3042 (1972) 16

White Castle System, 264 NLRB No. 43, 111 LRRM 1280 (1982) 20

Wyandotte Savings Bank, 245 NLRB No. 120 (1979) A13

Statutes

28 U.S.C. §160(e) 4
28 U.S.C. §1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

ROTH'S IGA FOODLINER, INC.,	)
Petitioner,	)
and	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent,	)
and	)
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,	)
Intervenor,	)

PETITION FOR A WRIT OF CERTIORARI
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Roth's IGA Foodliner, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 29, 1982.

Opinion Below

The memorandum opinion of the Court of Appeals, appears in the Appendix hereto. The supplemental decision of the Regional Director of the National Labor Relations Board also appears in the appendix. The National Labor Relations Board did not render an opinion in this case.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 29, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

Questions Presented

1. Did the Ninth Circuit err in enforcing the National Labor Relations Board's bargaining order, contrary to four (4) other circuits and other Board decisions, when it held that a single store unit is appropriate when the evidence showed geographic proximity; integration of operation and supervision; substantial interchange of employees; identical conditions of employment and job classifications; and a history of bargaining consistent with an employer-wide unit?

2. Did the Ninth Circuit err in enforcing the Board's bargaining order providing for piecemeal unionization and thereby ignoring the Employer's interest in avoiding a patchwork of bargaining agents in a centralized operation?

STATEMENT OF THE CASE

A. Nature Of The Proceedings

This action was commenced in the Ninth Circuit Court of Appeals by the National Labor Relations Board (hereinafter NLRB) against Roth's IGA Foodliner, Inc. (hereinafter Employer) to enforce a bargaining order issued by the Board. The Court of Appeals had jurisdiction over the proceeding under Section 10(e) of the Act [29 USC 160(e)].

On June 17, 1980 the Union filed a representation petition for the meat department employees of the Employer's Canby, Oregon facility. The Employer requested a hearing on the issue of the appropriateness of the unit.

The Employer argued that the Canby meat department employees were properly a part of the unit consisting of all its meat department employees at its other

stores; that is that they were an accretion to the existing unit.

After a hearing in which the Hearings Officer refused to admit evidence on several factors relating to accretion, the Regional Director directed an election for the Canby employees. The Employer made a Request for Review based on the Hearings Officer's prejudicial error in failing to admit the relevant evidence. On September 23, 1980, the hearing was re-opened for the purpose of hearing evidence on the accretion issue. The Regional Director rejected the Employer's arguments and issued a Supplemental Decision and Direction for Election on October 17, 1980.

Thereafter, the Employer filed a timely request for review of the Supplemental Decision. This request was denied. On November 21, 1980 an election was held pursuant to the Supplemental Decision.

The Union did not have a majority. On November 26 the Union filed objections to the election because of alleged unfair labor practices by the Employer, and sought a bargaining order.

The parties have stipulated that if the Canby store meat department employees comprise an appropriate unit, then a bargaining order is the appropriate remedy. The Employer refused to bargain with the Union in order to obtain court review of the Board's bargaining unit determination. The Employer's sole contention was that the Canby employees have accreted into the unit of employees covered by Local 1011 of the United Food & Commercial Workers Union.

On October 29, 1982, the Court of Appeals for the Ninth Circuit issued a memorandum decision enforcing the bargaining order and stating:

> The record shows that the meat department employees at the new store

had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees.

B. Statement Of The Facts

The relevant facts relation to the accretion issue are not in dispute and may be summarized as follows:

Geographic Proximity

The Employer has 9 principal places of operation. The first store opened in 1962 in Silverton, Oregon and is the location of the main office. The next eight stores opened between 1965 and 1980 and were located in several other communities in the Mid-Willamette Valley. The ninth store, which opened in May, 1980, is located in Canby, Oregon. All 9 stores are within a 50 mile radius of one

another. The Canby facility is 12-14 miles from its closest sister store.

Integration of Units

Each of the stores includes a grocery department, a meat department and a produce department. The stores sell essentially the same types of products and have the same basic physical lay-out. Shelf prices are the same at all nine stores.

All nine stores have a continuous, substantial interchange of products.

All administrative work is done in Silverton at the main office. All employee personnel files and bookkeeping records, including payroll, are kept at the main office. Accounts payable are all sent to Silverton and suppliers are paid with one check. There are two maintenance employees who work at all nine stores, according to need.

Supervision

Orville Roth is President of the corporation. Darrell Rybloom is Vice President and general manager. Gary Ohren is Assistant General Manager. The central administration also includes "coordinators" who are responsible for their departments at all nine stores. The meat coordinator is Dick Thurman. There are also individual store managers who report directly to Orville Roth, Darrell Rybloom and Gary Ohren.

Each meat department has a head meat cutter who is an hourly employee. This person acts as a working foreman and is covered by the collective bargaining agreement that the Employer has with UFCW Local 1011. He is not a supervisor.

Darrell Rybloom controls the overall labor relations for all nine stores, including the meat departments. He conducts negotiations with labor

organizations, and handles grievances or other problems not handled by Dick Thurman. Mr. Rybloom spends four to six hours a week at the Canby facility making sure it is run properly.

Mr. Thurman is responsible for all of the meat departments. He writes ads, supervises merchandising, directs buying, establishes suppliers, sets prices and oversees the management of the employees. He is responsible for disciplining meat department employees as well as transferring them. Mr. Thurman is responsible for on-the-job training of meat department employees. He spends 6-10 hours a week at the Canby facility and is in contact with the facility daily.

The individual store managers are responsible for keeping the store running smoothly. Their responsibility in day to day labor relations is limited to extreme

situations, such as an employee assaulting a customer.

The head meat cutter is directly responsible to Dick Thurman and is not under the supervision of the store manager. He has no authority to hire, fire, discipline, promote or transfer meat department employees. His main responsibility is making sure he has enough employees to cover the work and that adequate time records are kept.

Interchange of Employees

In the meat department there have been approximately 40 permanent transfers of employees among the stores since 1975. Most of these transfers were the result of Employer staffing requirements.

In addition, there are approximately one or two temporary transfers of meat department employees each month. These temporary transfers are coordinated through Dick Thurman and occur where there

is employee injury or vacation or a sudden influx of business occurs at a particular store.

Conditions of Employment

The working hours at the nine stores are identical. All orientation of new employees is handled through the central office. Employee rules apply to all employees at all stores, as encompassed in an employee handbook.

Bargaining History

The meat department employees of all the Employer's store locations, except Canby, are represented by the United Food & Commercial Workers Union, Local 1011. As the Employer has acquired or built new stores, the collective bargaining agreement with Local 1011 has automatically been extended to cover the meat department employees. There are now 80 to 90 employees covered by this contract. There is a single contract for all of the stores.

Although the contract expired in August, 1980, the agreement is still in effect and the Employer has not rescinded any of the terms of that agreement.

Upon the opening of the Canby store the terms of the collective bargaining agreement with Local 1011 were automatically applied, and health, welfare and pension contributions were paid as employees became qualified. Although Local 1011 has not formally intervened, it has indicated that it has no objection to representing the meat department employees at the Canby store.

Job Classifications

The meat department employees at the Canby facility have the same type of work as the meat department employees at the other facilities. The skills needed and job classifications are identical.

REASONS FOR GRANTING THE WRIT

1. THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS.

Although in theory all of the Circuits agree which factors should be used to determine whether an accretion exists, they do not apply these factors in the same way, nor do they always make their decision based on those factors.

In NLRB v. Chicago Health & Tennis Clubs, 567 F2d 331, 96 LRRM 3249 (Seventh Cir, 1977), a single store unit was considered inappropriate where 21 stores throughout Cook County, Illinois, operated during the same hours, had the same shelf prices and similar physical layouts. The district manager kept in daily phone contact with each store and visited each store every two days. The store managers had limited authority in labor policy. In a 13 month period, 18% of the employees were transferred among the Cook County

stores.

The First Circuit reversed a Board finding that a single store was appropriate where the personnel practices were centralized and integrated. In NLRB v. Purity Food Stores, 376 F2d 497, 65 LRRM 2261 (1967), the Court held seven small community supermarkets, all within a 30 mile radius of the company's central office to be a homogeneous operation. In that case hiring was done through central management. Local store managers could only discharge employees for "outrageous activity". Job classifications and wage rates were uniformly applied and the same fringe benefits were given at each store.

The Fourth Circuit found an accretion when the facilities were 27 miles apart and most of the employees at the new facility were new hires. Universal Security Instrument v. NLRB, 649 F2d 247, 107 LRRM 2521 (1981).

The Sixth Circuit has also reversed the Board on such issues. NLRB v. Pinkertons, 428 F2d 479, 74 LRRM 2355 (1970). Wayne Oakland Bank v. NLRB, 462 F2d 666, 80 LRRM 3042 (1972).

Despite these holdings, the Ninth Circuit, in its memorandum decision in the case at issue, held that the meat department employees at the Canby store had a separate identity from the other meat department employees, that there was not geographic proximity and that the central management did not perform day to day supervision adequate to find the requisite amount of centralization.

The facts in this case are indistinguishable from NLRB v. Chicago Health & Tennis Clubs, NLRB v. Purity Food Stores, and Universal Security Instruments v. NLRB, supra. There being no rational distinction, there is a split of authority

among the Circuits in applying the test for accretion.

2. PUBLIC POLICY REQUIRES A UNIFORMLY APPLIED TEST.

There is a fine balance which must be made in preserving the rights of employees to select their bargaining agent while considering a company's right to avoid the disruptive effects of piecemeal unionization. NLRB v. Purity Food Stores, supra. This balance, however, has not yet been fully achieved. Without further guidance, the Board and the courts will continue to make inconsistent and haphazard decisions.

The Board in the instant case seems to have relied totally on the facts that 6 out of 7 of the employees at the Canby store were new hires and the failure of Local 1011 to intervene because of an alleged lack of territorial jurisdiction. It is well settled Board law that

territorial jurisdiction is not a factor in determining what constitutes an appropriate unit. Building Construction Employer's Assn., 147 NLRB No. 29, 56 LRRM 1210 (1964); Groendyke Transport, Inc., 171 NLRB No. 143, 68 LRRM 1227 (1968). There is also dicta that indicates that the failure of a union to formally intervene is inconsequential. Bowman Transportation, 230 NLRB 143, 95 LRRM 1423 (1977). The fact that most of the employees at a newly opened facility were new hires did not prevent the Board from finding an accretion in Universal Security Instruments, 250 NLRB No. 92, 105 LRRM 1023 (1980), affirmed 649 F2d 247, 107 LRRM 2518 (1981).

Some limitations must be placed on the Board. It cannot be free to create new factors in order to justify a clearly erroneous decision, but must stay within its self-imposed guidelines.

Without such a restriction no employer, union or employee could ever be secure in acting under color of law. The Board and its agents, must be forced to comply with their own articulated standards. Until this Court orders such compliance, Board decisions and the subsequent Court holdings will continue to be based on whim.

In this case, the Board made a ruling contrary to Board precedent. They didn't think there was sufficient centralized control of operations, because the district manager visited each store twice a week, because the store manager had authority to discharge meat department personnel for outrageous conduct, and because a non-supervisory head meat cutter schedules employees, keeps pay records and orders supplies. In the past the Board has found accretions under all of these circumstances. Consolidated Foods Corp.,

213 NLRB No. 60, 87 LRRM 1170 (1974), ITT Continental Baking Co., 231 NLRB No. 61, 96 LRRM 1002 (1977), White Castle System, 264 NLRB No. 43, 111 LRRM 1280 (1982).

The Board, and the Courts which review the Board's decisions must be instructed as to the proper balance of employer's and employee's rights.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS

Accretion and the appropriateness of a unit are inevitably factual questions which have to be resolved on a case by case basis. However, that should not prevent this Court from setting straight forward guidelines enabling the Board, Unions, employees and employers to reasonably conclude which unit is appropriate without the need for regular Court intervention.

As it stands, the Board and the Courts are inundated with cases addressing this issue. In the interest of judicial economy and consistent decisions, the Supreme Court must review the Board's current position and place all parties involved with the collective bargaining process in a more tenable position.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

WILLIAMS & ZOGRAFOS, P.C.

By: Ronald J. Williams
RONALD J. WILLIAMS

By: Wendy B. Comstock
WENDY B. COMSTOCK
Of Attorneys for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No.81-7871
	)	36-CA-3768
and	)	
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,	)	MEMORANDUM
Intervenor,	)	
v.	)	
ROTH'S IGA FOODLINER, INC.,	)	
Respondent.	)	

Application for Enforcement of an Order of the NLRB Submitted September 22, 1982*

Before: BROWNING, Chief Judge, SNEED and SCHROEDER, Circuit Judges.

The NLRB, joined by intervenor Local 143-A, petitions for enforcement of its bargaining order against Roth's IGA. Roth's, the Union, and the NLRB General

*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(b).

Counsel entered a stipulation providing that if the Board found a single store bargaining unit appropriate for meat department employees at Roth's new store, a bargaining order should be entered. Roth's contends that the single store unit selected by the NLRB is inappropriate and that the new employees should be accreted to the unit of meat department employees existing in its other stores.

Unless clearly arbitrary or capricious, the Board's conclusion--that a bargaining unit is appropriate--will be approved on appeal. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978). The Board has acted within its discretion. The NLRB's factual conclusions in regard to the unit determination are supported, as they should be, by substantial evidence on the record as a whole. 29 U.S.C. § 160(e)(1976); Universal Camera Corp. v. NLRB, 340 U.S. 474,

71 S. Ct. 456 (1951).

The record shows that the meat department employees at the new store had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry. NLRB v. Lerner Stores Corp., 506 F.2d 706, 707-08 (9th Cir. 1978). See also NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978)(approval of NLRB policy against accretion in order to preserve §7

representation rights of new employees).

The NLRB order is enforced.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 19

ROTH'S I.G.A. FOODLINER, INC., Employer[1/]	)	
and	)	Case No. 36-RC-4348
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 143A, Petitioner[1/]	)	

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board on July 11, 1980. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director. On July

[1/] The Employer's and Petitioner's names appear as corrected at the hearing.

31, 1980, a Decision and Direction of Election was issued by the undersigned. Thereafter, on August 26, 1980, pursuant to a request by the Employer for review of the Decision, the National Labor Relations Board remanded the case to the undersigned Regional Director for the purpose of reopening the hearing and issuing a Supplemental Decision. The hearing was reopened and closed on September 23, 1980. The Hearing Officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case,[2/] the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

[2/]The Parties filed briefs which have been considered.

2. The Petitioner is a labor organization within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent all meat department employees employed at the Employer's Canby, Oregon facility. The Employer contends that said employees should be accreted to a collective-bargaining unit of employees at the Employer's other eight facilities in the State of Oregon. The Employer's other employees are represented by Local 1011, United Food and Commercial Workers

International Union, AFL-CIO, CLC (herein called Local 1011) which has a collective bargaining agreement (herein called the contract) with the Employer. The Employer argues that the Canby facility is an accretion to the other eight facilities.

The contract was in effect from September 4, 1977 to August 1, 1980. The Employer has continued to apply the terms of the contract to its other eight grocery stores in Oregon. It is unclear from the record whether meat department employees at all eight stores form a single unit, or eight separate units covered by the same contract. There are no provisions for transfers and seniority is accrued on a store-by-store basis. In any event, the contract does not, by its terms presently cover employees at the Canby facility, nor is there an after-acquired store clause and Local 1011 does not claim to represent the unit sought by the Petitioner.

Further, Local 1011 expressed no interest in intervening in the hearing or appearing on the ballot in the event of an election involving employees at the Canby facility.

Although the contract does not contain a description of the geographic scope of the employees covered thereunder, the Employer has recognized Local 1011 and applied the contract terms to its meat department employees in any new grocery store acquired by it within the jurisdiction of Local 1011 since 1965. Nevertheless, when the Employer acquired the Canby, Oregon facility in approximately May 1980 it did not recognize Local 1011 as the bargaining representative for its meat department employees employed in that facility. This circumstance apparently resulted from Local 1011's uncertainty regarding whether its jurisdiction encompassed Canby, Oregon. The Employer now asserts that Local 1011 jurisdiction

clearly includes the Canby facility.

The Employer's central corporate offices and headquarters are located in Silverton, Oregon. The Employer's original store commenced operations in Silverton in 1962. Since that time the Employer has opened new stores in Salem, Oregon (one in 1965, another in 1978), Woodburn, Oregon in 1967, McMinnville, Oregon in 1969, Albany, Oregon in 1972, Corvallis, Oregon in 1976, and Lebanon, Oregon in 1979. The Canby store opened in May 1980. All of the Employer's stores are within a 50-mile radius of the Silverton headquarters. The Canby store is 20 miles from the Silverton headquarters and only 12 to 14 miles from the Woodburn store.

Orville Roth is the President of the Employer. Charles Rybloom is the Vice-President and General Manager. Gary Ohren is Assistant General Manager. Their

offices are located in Silverton, Oregon. Dick Thurman is the meat coordinator. His office is in Salem, Oregon. Each store has a store manager who reports directly to Ohren and Rybloom. The store managers have little authority over the meat department employees on a daily basis, but they do have the authority to discharge for extraordinary misconduct.

Thurman is responsible for the meat departments in each of the nine stores. At each store there is a head meat cutter. The head meat cutter reports to Thurman rather than the store manager. Thurman does the hiring and firing of all meat department personnel. Thurman visits each store approximately six hours each week on two separate occasions.

The Canby meat department receives its merchandise from meat, fish, poultry and deli suppliers. The employees then cut the items up, weigh, wrap and display

them. The same skills and duties are required at all nine stores.

The head meat cutter at the Canby store is Terry Lovis. his is paid hourly and performs the same skills as the other meat department employees. Additionally, he schedules the other employees at the direction of Thurman, keeps the pay records, and orders merchandise either through Thurman or directly from suppliers specified by Thurman.

Prior to the opening of the Canby location, the Employer posted a notice at the Canby location that they would be interviewing for new hires. Six employees were hired. Only one of the six hired came from the Employer's other stores. Since the store has been opened, one of the original employees has transferred from Canby to another of the Employer's store. No other employee was hired or transferred to take his place. Except for

the initial week of the Employer's operation at Canby, there have not been any temporary transfers between the Canby store and the Employer's other eight stores. During the first week one employee from a Salem store worked for a day or two at the Canby store.

Where an employer operates more than one facility, it is well-established Board policy to find a single store unit presumptively appropriate. Wyandotte Savings Bank, 245 NLRB No. 120(1979); Haag Drug Company, Incorporated, 169 NLRB 877(1968). This presumption can be rebutted by evidence that the single facility has been merged into a more comprehensive unit by bargaining history or operational integration causing the single store unit to lose separate identity. The Kendall Company, 184 NLRB 847 (1970).

When there is a new facility as here, the Board considers a number of factors to determine whether or not the new group of employees should be accreted to an existing unit, including the integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and function, common control over labor relations, collective bargaining history and interchange of employees. TRT Telecommunications Corporation, 230 NLRB 139(1977).

The Employer urges that the centralization of managerial and administrative control, the similarity of working conditions, skills and functions, common control over labor relations, geographical proximity and integration of operations require a finding of accretion. But where an accretion is urged, the Section 7 rights of the employees involved must be

carefully considered. Excessive preoccupation with "appropriate unit" cannot be used to disenfranchise employees. In an initial representation proceeding involving multi-locations, the employees at the various locations have an opportunity to participate in the representation process. However, employees at a new separate location that has been absorbed into a system-wide unit are denied that opportunity. Accordingly, the Board will not "under the guise of accretion" compel employees who may constitute a separate appropriate unit to be include in an overall unit. Melbet Jewelry Co., Inc, and I.D.S. - Orchard Park, Inc., 180 NLRB 107 (1969).

The fact that six out of seven of the employees who opened the Employer's Canby meat department were new hires and not transferred from the Employer's other meat departments and therefore never had an

opportunity to decide whether or not they wished to be represented by Local 1011 is persuasive evidence that the presumption of a single store unit was not overcome. The insignificant interchange of employees between the Canby location and the Employer's ;other operations is further support for such a conclusion. Warehouse Markets, Inc., 174 NLRB 401 (1969).

Accordingly, based upon the above important considerations, Local 1011's lack of interest in representing the employees in question, and the record as a whole, I find that a question concerning representation has been raised by the instant petition.

There are approximately 6 employees in the unit.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the

Act:

All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by Roth's I.G.A. Foodliner, Inc., at its Canby, Oregon facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who

retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by United Food and Commercial Workers International Union, AFL-CIO, CLC, Local 143A.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of

the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 165 NLRB 1236(1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligiblity list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received by the Subregional Office, 825 Pittock Block, 921 S.W. Washington, Portland, Oregon 97205, on or before October 24, 1980. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay

the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by October 30, 1980.

Dated at Seattle, Washington, this 17th day of October 1980.

CHARLES M. HENDERSON

Charles M. Henderson, Regional Director
National Labor Relations Board, Reg. 19
2948 Federal Building, 915 Second Ave.
Seattle, Washington 98174

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

No._____

ROTH'S IGA FOODLINER, INC.,	)
	)
Petitioner,	)
and	)
NATIONAL LABOR RELATIONS BOARD,	)
	)
Respondent,	)
	)
and	)
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,	)
	)
Intervenor.	)

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of January, 1983, three copies the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

Donald S. Richardson
1201 S.W. 12th Ave., Suite 210
Portland, Oregon 97205
Of Attorneys for Intervenor

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of General Counsel
Washington, D.C. 20570
Of Attorneys for Respondent

I further certify that all parties required to be served have been served.

Ronald J. Williams
P.O. Box 5419,
Salem, Oregon 97304
Of Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1290

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROTH'S I.G.A. FOODLINER, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PAT WYNNS
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably found that the meat department employees in one of petitioner's stores did not constitute an accretion to the existing bargaining unit covering petitioner's other stores but rather constituted a separate appropriate bargaining unit.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 5

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Banco Creditor y Ahorro Ponceno v. *NLRB*, 390 F.2d 110, cert. denied, 393 U.S. 832 7

Boire v. *Int'l Brotherhood of Teamsters*, 479 F.2d 778 5

Bowman Transportation, Inc., 230 N.L.R.B. 935 9

Building Construction Employer's Ass'n, 147 N.L.R.B. 222 9-10

Groendyke Transport, Inc., 171 N.L.R.B. 997 10

Kaynard v. *Mego Corp.*, 633 F.2d 1026 6

Lawson Milk Co., Division, Consolidated Foods Corp., 213 N.L.R.B. 360 9

Melbet Jewelry Co., 180 N.L.R.B. 107 ..... 4, 5-6

Michigan Hospital Service Corp. v. *NLRB*, 472 F.2d 293 8

Page

Cases—Continued:

NLRB v. *Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331, cert. denied, 437 U.S. 904 8

NLRB v. *Forest City Enterprises, Inc.*, 663 F.2d 34 8

NLRB v. *Pinkerton's, Inc.*, 428 F.2d 479 8

NLRB v. *Purity Food Stores, Inc.*, 376 F.2d 497, cert. denied, 389 U.S. 959 7

NLRB v. *Quaker City Life Insurance Co.*, 319 F.2d 690 7

NLRB v. *Retail Clerks Local 588*, 587 F.2d 984 5

NLRB v. *Security-Columbian Banknote Co.*, 541 F.2d 135 5

NLRB v. *Sunset House*, 415 F.2d 545 6

Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 6

Sheraton-Kauai Corp. v. *NLRB*, 429 F.2d 1352 5

South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 6

Universal Security Instruments, Inc., 250 N.L.R.B. 661, modified on other grounds, 649 F.2d 247, cert. denied, 454 U.S. 965 ..... 6, 7, 9

Walgreen Co. v. *NLRB*, 564 F.2d 751 8

Page

Cases—Continued:

Wayne Oakland Bank v. *NLRB*, 462 F.2d 666 7

Westinghouse Electric Corp. v. *NLRB*, 440 F.2d 7, cert. denied, 404 U.S. 853 5

White Castle Systems, Inc., 264 N.L.R.B. No. 43 (Sept. 29, 1982) 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 4
Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 4
Section 9(a), 29 U.S.C. 159(a) 2
Section 9(b), 29 U.S.C. 159(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1290

ROTH'S I.G.A. FOODLINER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished. The decision and order of the National Labor Relations Board is reported at 259 N.L.R.B. 132. The supplemental decision and direction of election of the Regional Director (Pet. App. A5-A20) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1982. The petition for a writ of certiorari was filed on January 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provide:

> Section 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * * *
>
> Section 9(a) and (b), 29 U.S.C. 159(a) and (b). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

STATEMENT

1. Petitioner ("the Company") operates nine retail food stores within a 50-mile radius of Silverton, Oregon, where its principal store and headquarters are located. Its store in Canby, Oregon, opened in May 1980, and in June 1980 the

United Food and Commercial Workers, Local 143-A ("the Union") petitioned the Board for a representation election among the store's meat department employees (Pet. App. A7, A10). The Company opposed the petition, urging that these employees should be accreted to the bargaining unit consisting of all meat department employees in its other Oregon stores (Pet. App. A8).

After a hearing, the Board's Regional Director concluded that the Canby store meat department was an appropriate bargaining unit. He explained that a single-store unit is presumptively appropriate in the retail sales industry (Pet. App. A1, A3) and found that the presumption was not overcome here. In so finding, the Regional Director noted that six of the seven employees who opened the Canby store meat department were new hires and that there was an insignificant interchange of employees between the Canby store and the Company's other stores (Pet. App. A15-A16). He further noted that only one employee, who was not replaced, transferred to another Company store and that, except for the first week after the store opened, no employees temporarily transferred between the Canby store and the Company's other stores (Pet. App. A12-A13).[1] In addition, he found it significant that the union that represented the employees in the Company's other meat departments was uncertain whether it had jurisdiction over the Canby store[2] and, in any event, showed no interest in representing the Canby employees (Pet. App. A9, A16).

---

[1]In contrast, of the approximately 80 to 90 meat department employees at the Company's other stores, about 21 were involved in at least 35 different transfers from one store to another (RX 3; Tr. 104). ("RX" refers to petitioner's exhibits filed in the Board's representation proceeding; "Tr." refers to the transcript of the representation hearing.)

[2]The United Food and Commercial Workers International Union, with which both Local 1011 and the Union are affiliated, determined that the Union, not Local 1011, had territorial jurisdiction over Clackamas County, in which Canby is located.

Rejecting the Company's assertion that the Canby meat department employees should be considered an accretion to its other eight facilities (Pet. App. A8, A14-A15), the Director explained that, in order to preclude disenfranchising employees who have not previously voted to establish a multi-location unit, "the Board will not 'under the guise of accretion' compel employees who may constitute a separate appropriate unit to be includ[ed] in an overall unit" (Pet. App. A15), citing *Melbet Jewelry Co.*, 180 N.L.R.B. 107 (1969).[3]

The Board denied the Company's request for review of the Regional Director's unit determination. The Board subsequently found that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and issued a bargaining order (259 N.L.R.B. 132, 134-135 (1981)).[4]

---

[3]In *Melbet*, the Board held that where, in a retail chain-store operation, both a single-store unit and a multi-store unit would be appropriate, it would not consider a new single store to be an accretion to an existing unit. Despite the fact that the stores were geographically proximate and had centralized management, the Board found that the single store was an appropriate unit since the employees at that store were new hires, there was a lack of employee interchange with the other stores, and the store manager had day-to-day control over employee relations (180 N.L.R.B. at 109).

[4]The election resulted in a tie vote. However, the Union filed objections to the election, as well as the instant unfair labor practice charges, and alleged that petitioner had engaged in unlawful conduct during the course of the election campaign. The parties entered into a stipulation in which petitioner withdrew its denial of the unlawful conduct alleged but preserved its position that the Canby meat department employees constituted an inappropriate unit. The stipulation further provided that a bargaining order would be the appropriate remedy should that unit be found appropriate (259 N.L.R.B. at 132-133).

2. The court of appeals by memorandum order enforced the Board's order, holding that substantial evidence supported the Board's conclusion that the employees in the Canby meat department constituted an appropriate bargaining unit (Pet. App. A2). The court stated that (Pet. App. A3):

> the meat department employees at the new store had a separate identity from those at Roth's other stores, * * * Roth's central management did not perform day-to-day supervision at the store, and * * * the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry [citations omitted].

ARGUMENT

In order to protect the right of employees to choose whether they want union representation and to select their own bargaining agent, a group of employees is not deemed an accretion to an existing unit unless the party seeking the accretion shows not only that the expanded unit is appropriate, but also that "the new employees have no separate identity from employees in the existing unit * * *." *NLRB* v. *Retail Clerks Local 588*, 584 F.2d 987, 987 (9th Cir. 1978). See also *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976); *Boire* v. *Int'l Brotherhood of Teamsters*, 479 F.2d 778, 795-796, 798-799 (5th Cir. 1973); *Westinghouse Electric Corp.* v. *NLRB*, 440 F.2d 7, 11 (2d Cir.), cert. denied, 404 U.S. 853 (1971); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1354, 1355-1357 (9th Cir. 1970); *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 109-110

(1969). Accordingly, in determining whether a new store may be accreted to an existing unit, the Board determines whether the employees of that store could appropriately be represented in a separate bargaining unit. In making that determination, the Board looks to such factors as the degree of centralized managerial control, the extent of employee interchange, the integration of operations, the geographical proximity of the operations, and the prior bargaining history. *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1030-1031 (2d Cir. 1980); *NLRB* v. *Sunset House*, 415 F.2d 545, 548 (9th Cir. 1969).

Petitioner does not dispute these settled principles. Rather it contends that the Board and the court of appeals erred in concluding that the facts of this case did not support a finding of accretion. This fact-bound issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the Board's unit determination here was a reasonable exercise of its broad discretion in representation matters. *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

1. Petitioner contends (Pet. 14-17) that the decision below conflicts with decisions of other circuits applying the Board's accretion principles. However, the cases relied on by petitioner are all distinguishable.[5]

---

[5]With the exception of *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981), none of the cases relied on by petitioner involved an accretion situation. They all involve situations where a union sought to represent only one store of a chain or only one part of a multi-branch organization.

In *NLRB* v. *Purity Food Stores, Inc.*, 376 F.2d 497 (1st Cir.), cert. denied, 389 U.S. 959 (1967) (Pet. 15), the court rejected a single-store bargaining unit where, in addition to centralized and integrated personnel practices and procedures, there were frequent interchanges of employees (376 F.2d at 501). The court reasoned (*ibid.*) that, due to the frequent interchange of employees, a single-store bargaining unit could result in nonunion employees working beside employees under union rules concerning wages, hours, seniority, and grievance procedures. The same court, however, has upheld single-store units where, as here, there is little employee interchange and the store manager has authority over day-to-day working conditions. *Banco Credito y Ahorro Ponceno* v. *NLRB*, 390 F.2d 110, 112 (1st Cir.), cert. denied, 393 U.S. 832 (1968).

In *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981) (Pet. 15), the court rejected the Board's single-plant unit determination because, among other things, the plant at issue was established to supplement another of the company's plants; a significant number of employees from the established, unionized plant transferred to the new plant; and both plants drew their workers from the same metropolitan labor pool (649 F.2d at 254). All of these factors and especially the numerous inter-plant employee transfers distinguish *Universal Security Instruments* from the present case. On the other hand, in *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 692-693 (4th Cir. 1963), the same court upheld the Board's single-office unit determination on facts similar to those here.

In *Wayne Oakland Bank* v. *NLRB*, 462 F.2d 666, 668 (6th Cir. 1972) (Pet. 16), where a single-branch bargaining unit was found inappropriate, the Sixth Circuit focused upon the "substantial employee interchange" and relied on the First Circuit's decision in *Purity Food Stores*, which

outlined the problems that could result if a single-store bargaining unit were approved in such a situation. And in *NLRB* v. *Pinkerton's, Inc.*, 428 F.2d 479 (6th Cir. 1970) (Pet. 16), where a multi-office bargaining unit was sustained, the court found that there was close district-wide supervision over all guard operations in the district, that the company's collective bargaining history showed that bargaining had almost always been conducted on a district-wide basis, and that guards were transferred within the district (428 F.2d at 483). However, in *NLRB* v. *Forest City Enterprises, Inc.*, 663 F.2d 34, 35-36 (6th Cir. 1981), the court upheld a single-store bargaining unit where there was little employee interchange, the manager controlled the day-to-day operations, and the union organizational attempts occurred only at the single-store level. See also *Michigan Hospital Service Corp.* v. *NLRB*, 472 F.2d 293, 296 (6th Cir. 1972) (single-office unit determination appropriate where the office manager possessed considerable autonomy over personnel matters).

The Seventh Circuit's decision in *NLRB* v. *Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331 (1977), cert. denied, 437 U.S. 904 (1978) (Pet. 14), is also factually distinguishable from the present case. There the court rejected the Board's single-unit determination because permanent and temporary transfers occurred frequently, the history of collective bargaining showed that unionization had always been district-wide, and the company's operations were highly centralized (567 F.2d at 336-338). Significantly, in that same decision, the court approved the Board's determination that a single club owned by the Chicago Health Tennis Clubs was an appropriate bargaining unit since there was no prior history of collective bargaining and [illegible] interchange of employees other than trainees among the various clubs (*id.* at 339, 340). See also *Walgreen Co.* v. *NLRB*, 564 F.2d 751, 754 (7th Cir. 1977) (single-retail-store

bargaining unit appropriate where there was an insubstantial amount of employee interchange and local store manager exercised control over day-to-day employment activities).

2. There is also no merit to petitioner's contention (Pet. 17-20) that the decision below conflicts with Board precedents allegedly holding that a single-store unit is inappropriate if the employees involved are new hires and the union that represents the employer's other employees disclaims jurisdiction. First, contrary to petitioner's assertion (Pet. 17), the Board did not rely solely on those two factors in making its unit determination here. As previously noted (*supra*, pages 3-5), the Board and court of appeals also relied on the insignificant interchange of employees between the Canby location and the Company's other stores and the lack of day-to-day supervision at the Canby store by central management.

Moreover, the cases upon which petitioner relies either support the result reached here or are factually distinguishable. In *Bowman Transportation, Inc.*, 230 N.L.R.B. 935, 936 (1977) (Pet. 18), the Board found that a new terminal was not an accretion to an existing unit for essentially the same reasons given here. In *Universal Security Instruments, Inc.*, 250 N.L.R.B. 661 (1980), modified on other grounds, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981), the Board found an accretion because a new plant was found to constitute an expansion of an existing plant (see 649 F.2d at 254). Obviously, no such finding could be made here. In *White Castle Systems, Inc.*, 264 N.L.R.B. No. 43 (Sept. 29, 1982) slip op. 7 (Pet. 20), and *The Lawson Milk Co., Division, Consolidated Foods Corp.*, 213 N.L.R.B. 360, 361-362 (1974) (Pet. 19-20), the Board found that the presumption of the appropriateness of a single-store unit was rebutted by evidence, *inter alia*, of extensive employee interchange and lack of local autonomy. In *Building*

Construction Employer's Ass'n, 147 N.L.R.B. 222, 223-224 (1964) (Pet. 18), and *Groendyke Transport, Inc.*, 171 N.L.R.B. 997 (1968), the Board rejected union requests for units coextensive with their territorial jurisdiction. In *Building Construction*, the Board noted that the requested unit would encompass the employees of 165 separate employers and that only a few of those groups had relinquished their right to bargain individually. And, in *Groendyke*, the Board found that the presumptive appropriateness of single-terminal units was not overcome where there was no geographic or administrative cohensiveness to the regional unit sought by the union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

LINDA SHER
Assistant General Counsel

PAT WYNNS
Attorney
National Labor Relations Board

MARCH 1983

DOJ-1983-03

82-1290

FILED
FEB 19 1983
ALEXANDER L. STEVAS,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

ROTH'S I.G.A. FOODLINER, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL NO. 143-A,

Intervenor.

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Allen T. Murphy, Jr.
RICHARDSON, MURPHY & TEDESCO
210 Century Tower, 1201 S.W. 12th
Portland, Oregon 97205
Telephone: (503) 228-2366

Counsel of Record for Intervenor

Donald S. Richardson
RICHARDSON, MURPHY & TEDESCO
210 Century Tower, 1201 S.W. 12th
Portland, Oregon 97205
Telephone: (503) 228-2366

Of Attorneys for Intervenor

TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

Argument 3

Conclusion 10

Appendix

A. Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit A-1

Certificate of Service

TABLE OF AUTHORITIES

Cases	Page
NLRB v. Chicago Health & Tennis Clubs, 567 F.2d 331 (7th Cir. 1977)	5,7
NLRB v. Pinkertons, 428 F.2d 479 (6th Cir. 1970)	8,9
NLRB v. Purity Food Stores, 376 F.2d 497 (1st Cir. 1967)	7
Packard Motor Co. v. NLRB, 33 U.S. 485 (1947)	4
Universal Security Instruments v. NLRB, 649 F.2d 247 (4th Cir. 1981)	8
Wayne Oakland Bank v. NLRB, 462 F.2d 666 (6th Cir. 1972)	9

Statutes

29 U.S.C. §159(b)	3

Introduction

United Food & Commercial Workers, Local Union No. 143-A, was the Charging Party in this case before the National Labor Relations Board and the Union also was the Petitioner in the representation proceeding that preceded the Charge case. United Food & Commercial Workers, Local 143-A, (hereafter "Intervenor") intervened in the enforcement proceeding brought by the Board in the Ninth Circuit Court of Appeals and Intervenor opposes the Petition for a Writ of Certiorari filed with this Court.

In the representation case, the Board found that a unit of meat department employees at the Petitioner's Canby, Oregon store was an appropriate unit. The Canby store had previously been owned and operated by other firms and the Intervenor had been the bargaining represent-

ative for the meat department employees at that store. Petitioner operates other stores in Oregon but not within the Intervenor's territorial jurisdiction and the meat department employees in these other stores located in other Oregon cities have been represented by United Food & Commercial Workers, Local No. 1011. At the representation hearing, Local 1011 expressly disclaimed representation of the meat department employees at the Canby store.

After considering all of the facts with respect to the Petitioner's operations and the particular facts concerning the Canby store, the Board concluded that the presumption that a single store unit was appropriate had not been rebutted by evidence offered by the Petitioner. A panel of three (3) Judges on the Ninth Circuit Court of

Appeals found that the case was appropriate for submission without oral argument and in its memorandum opinion, the Court observed:

> "The record shows that the meat department employees at the new store had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the pre-existing union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry." (Citations)

Argument

It is elementary, of course, that Section 9(b) of the National Labor Relations Act (29 U.S.C. §159(b) confers broad discretion on the Board with

respect to the matter of determining what units are appropriate and that the Board's determinations invoke "of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Co. v. NLRB, 33 U.S. 485, 491 (1947).

An examination of the Board's decision in the representation case shows that the Board did consider the usual factors in determining whether the presumption that a single store unit is appropriate had been rebutted. Unit determination questions necessarily involve consideration of the particular facts in each case. Pertinent facts in connection with the determination vary, of course, from case to case. Here, Petitioner asserts that the Courts of Appeal for the First, Fourth, Sixth and

Seventh Circuits have issued decisions that are contrary to the decision of the Ninth Circuit in the instant case and that a split of authority among the Circuits exists as a result. Petitioner's contention is inaccurate because the facts of the present case are not "indistinguishable" from the facts of the cases cited from the other four Circuits.

Petitioner claims that the decision in NLRB v. Chicago Health and Tennis Clubs, 567 F.2d 331 (7th Cir. 1977), is contrary to the decision of the Ninth Circuit in the instant case. Petitioner's claim is not supported by an examination of the decision. The decision actually involves two cases. The first case concerned a corporation engaged in the retail sale of paint, wallpaper and home decorating supplies through 21 stores in the Chicago metro-

politan area. In this case, the Court did refuse to enforce the Board's Order noting that the Employer's business was both centralized and integrated, that the individual stores lacked meaningful identity as self-contained units, and that there were substantial numbers of employee transfers, both temporary and permanent, among the metropolitan area stores. In the instant case, we do not have a group of stores all within the metropolitan area of one city. We have one store located in Canby, Oregon within the Intervenor's jurisdiction and eight other stores situated in other Oregon cities. In addition, as the Board observed in the present case, the interchange of employees between the Canby location and the Petitioner's other stores was insignificant.

The other case reported with the

Saxon Paint case involved Chicago Health Clubs and in that case, the Court concluded that the Board's determination that a single store unit was appropriate was reasonable and the Court enforced the Board's Order.

Petitioner cites NLRB v. Purity Food Stores, 376 F.2d 497 (1st Cir. 1967). While this case does involve retail food stores, there are factual differences from the instant case. The Court observed that "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation." The present case does not involve similar facts or findings. In addition, the present case presents the matter of the bargaining representative for Petitioner's other stores (Local 1011) having disclaimed representation of employees at

the Canby store.

Petitioner also cites Universal Security Instruments v. NLRB, 649 F.2d 247 (4th Cir. 1981). The facts of the cited case are not at all close to those of the case at bar. The cited case involves a manufacturing operation and the Court held simply that the Board did not abuse its discretion in finding that a new plant within the metropolitan area of Baltimore, Maryland constituted an "accretion" to the unit composed of employees at two existing plants.

Petitioner cites NLRB v. Pinkertons, 428 F.2d 479 (6th Cir. 1970). The cited case, of course, involves guards. It appeared that the Columbus district office exercises close supervision over all guards in that district, and consequently the Court refused to enforce the Board's Order which had been

based upon a determination that 31 guards in the Mansfield area within the Columbus district constituted an appropriate unit. Factual differences in the Pinkertons case and the instant case are obvious.

Petitioner also cites Wayne Oakland Bank v. NLRB, 462 F.2d 666 (6th Cir. 1972). In the cited case, the Board had found that employees at one branch bank constituted an appropriate unit. The branch banks all were within 25 miles of the main office and the Court concluded that the record revealed a banking operation which was a highly centralized and fully integrated system. The Court therefore concluded that the Board's determination that employees at one branch constituted an appropriate bargaining unit amounted to an abuse of discretion.

Conclusion

In conclusion, we respectfully submit that the Board acting through the Regional Director for the Nineteenth Region properly exercised its discretion in deciding that the appropriateness of a single store unit at Canby, Oregon for meat department employees had not been rebutted. We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARDSON, MURPHY & TEDESCO

By
ALLEN T. MURPHY, JR.

By Donald S. Richardson
DONALD S. RICHARDSON

Of Attorneys for Intervenor

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No.81-7871
	)	36-CA-3768
and	)	
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,	)	MEMORANDUM
Intervenor,	)	
v.	)	
ROTH'S IGA FOODLINER, INC.,	)	
Respondent.	)	

Application for Enforcement of an Order of the NLRB Submitted September 22, 1982*

Before: BROWNING, Chief Judge, SNEED and SCHROEDER, Circuit Judges.

The NLRB, joined by intervenor Local 143-A, petitions for enforcement of its bargaining order against Roth's IGA. Roth's, the Union, and the NLRB General

*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(b).

Counsel entered a stipulation providing that if the Board found a single store bargaining unit appropriate for meat department employees at Roth's new store, a bargaining order should be entered. Roth's contends that the single store unit selected by the NLRB is inappropriate and that the new employees should be accreted to the unit of meat department employees existing in its other stores.

Unless clearly arbitrary or capricious, the Board's conclusion--that a bargaining unit is appropriate--will be approved on appeal. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978). The Board has acted within its discretion. The NLRB's factual conclusions in regard to the unit determination are supported, as they should be, by substantial evidence on the record as a whole. 29 U.S.C. § 160(e)(1976); Universal Camera Corp. v. NLRB, 340 U.S. 474,

71 S. Ct. 456 (1951).

The record shows that the meat department employees at the new store had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry. NLRB v. Lerner Stores Corp., 506 F.2d 706, 707-08 (9th Cir. 1978). See also NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978)(approval of NLRB policy against accretion in order to preserve §7

representation rights of new employees).

The NLRB order is enforced.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

ROTH'S I.G.A. FOODLINER, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,

Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of February, 1983, three copies of the Intervenor's Brief in Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

Ronald J. Williams
P.O. Box 5419
Salem, Oregon 97304
Of Counsel for Petitioner

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of General Counsel
Washington, D.C. 20570
Of Counsel for Respondent

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

Allen T. Murphy, Jr.
210 Century Tower
1201 S.W. 12th Avenue
Portland, Oregon 97205
Of Counsel for Intervenor